

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN W. WILSON)	
Claimant)	
V.)	
)	Docket No. 1,063,947
PRICE TRUCK LINE, INC.)	
Respondent)	
AND)	
)	
PRAETORIAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 9, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Kenton D. Wirth, of Wichita, Kansas, appeared for the claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board adopts the same stipulations and has considered the same record as did the ALJ, consisting of the transcript of the April 30, 2013, Preliminary Hearing with exhibits attached; the transcript of the November 25, 2014, Preliminary Hearing, with exhibits attached, and the documents of record filed with the Division.

ISSUES

The ALJ found claimant's accident arose out of and in the course of his employment and ordered an Independent Medical Examination (IME) with Dr. Eva Henry, for a determination of whether claimant is at maximum medical improvement and other issues as noted in the separate Order for an IME of January 9, 2015.

Respondent appeals, arguing claimant failed to prove his injury arose out of and in the course of his employment as claimant was unable to prove how he was injured, and unexplained accidents are not compensable. Therefore, the Board should reverse the

ALJ's Order. Should the Board find the claim compensable, respondent argues claimant is at maximum medical improvement and not entitled to additional medical treatment.

Claimant argues the ALJ's Order should be affirmed.

The issue on appeal is whether claimant sustained personal injury by accident arising out of and in the course of his employment.

FINDINGS OF FACT

The Board adopts its findings of fact from its Order of September 16, 2013, in which this Board Member affirmed the preliminary hearing Order of then ALJ Nelsonna Potts Barnes denying benefits to claimant for failing to prove he suffered accidental injury arising out of and in the course of his employment with respondent.

At the preliminary hearing of November 25, 2014, claimant testified he continues to have problems especially with his hearing¹, which gets worse every day. His eyesight has worsened and he continues to have headaches. Claimant has had headaches since he woke up in the hospital after the April 14, 2012, accident. Claimant has not worked since the April 14, 2012, accident.

Claimant began working for respondent in January 2012. This was claimant's second time working for respondent. He testified that his job was to log the load of each of the trucks and then he would drive the truck away from the dock from one plant to another. There were times when the truck would be empty and he would pull it up to the dock to be loaded. Claimant did not do over-the-road driving and strictly limited his driving to the city limits of Winfield, Kansas. Claimant testified that his job was to drive the trucks to different locations, all within a two mile radius. Depending on the location of the trailers, the doors would be open or closed. The doors were usually open if the truck was backed up to the dock.

Claimant cannot completely recall the details of the accident, and does not remember what he was doing on the day he was injured. There were no actual witnesses, but it was speculated that claimant backed a trailer up to be loaded and was preparing the trailer to be pulled away from the dock when a gust of wind blew the doors on the trailer door out while he was trying to latch them and one of the doors hit him in the head, knocking him unconscious. Claimant was in a coma for six days after the accident. When he came to he was in the hospital, but at first he thought he was at home.

EMT records indicate claimant was found sitting in the parking lot on the rear passenger side of a tractor trailer. The rear doors of the tractor trailer were swinging

¹ He has one hearing aid.

heavily in the wind and witnesses speculated claimant had been struck in the head by the doors. Claimant's head was bleeding and he was unable to follow commands, so he was transported to the hospital. Claimant denies fainting before April 14, 2012.

Virgil Bowles, claimant's co-worker, also worked for respondent shuttling trailers from one plant to another in Winfield. Mr. Bowles testified a CDL and a medical examination are required to do this job. Medical examinations are required either yearly or every two or three years depending on the doctor doing the exam.

Mr. Bowles described the job that he and claimant performed as transporting trailers to other locations. He testified the driver is responsible for making sure the trailer doors are shut usually starting with the driver's side door and then the passenger side door.

Mr. Bowles was working on April 14, 2012, and was the first person to see claimant after the accident. The work schedule that day was 6:00 p.m. to 6:00 a.m. Mr. Bowles spoke with claimant before the accident for between 30 minutes and an hour. The two talked about how windy it was on that night and about rain. Mr. Bowles indicated that claimant appeared normal and coherent. When claimant got up to walk away there was no sign of an abnormal gait.

Mr. Bowles testified the next time he saw claimant on the night of the accident was around thirty minutes later as he was preparing to pull out to transport his trailer. He noticed claimant's trailer was still sitting there with only the drivers side door closed. Mr. Bowles stopped, thinking claimant was preparing to shut the passenger door and when he didn't see claimant he went over to investigate. He found claimant on the ground trying to get up and saw blood on the ground by claimant. He told claimant to stay down. Mr. Bowles testified he saw no blood on the trailer or the doors, but he didn't look that way. The only mark he saw on claimant was one at the back of claimant's head and he saw blood on the back of claimant's head. He didn't notice the damage to claimant's head until claimant took his cap off.

Mr. Bowles testified the weather that night was windy. The wind was coming from the north and the south and was very gusty. He indicated claimant's truck was facing the north. Mr. Bowles testified that wind could move a door like a sail and if a person were holding onto the door the wind could move both the person and the door. He testified: "It all depends on which way the wind is coming. If you are going into the wind, then it's easier kind of -- well, not going into it, but let's say if the wind is coming from behind you, you can just turn the door loose. That's what I usually do is let the wind blow the door closed. Now, if you are going in the opposite direction and the wind is behind you and you're in front of the door and the wind's coming towards you, it can knock you over."² He

² P.H. Trans. (Nov. 25, 2014) at 55-56.

indicated the wind gusts that night made the job dangerous. He testified that at times, in windy situations, the door will flip you.

Mr. Bowles reported claimant's accident and was instructed to stay with claimant and that help was on the way. He did not notice anything on the ground that claimant could have tripped over. The pavement was dry except for claimant's blood. When EMS arrived the passenger door of claimant's trailer was swinging heavily in the wind. Mr. Bowles testified the assumption was that the door hit claimant and knocked him over because nothing else around would have caused claimant to be on the ground.³

Claimant's supervisor, Gary Heilig, testified he received a call at 11:40 p.m. advising him claimant was injured and an ambulance had been called. Mr. Heilig arrived on site at 12:13 a.m. He confirmed there were no obstacles at the scene that claimant could have tripped over. He also confirmed it was windy that night.

Dearrick Gregory, a distribution supervisor for Rubbermaid, was notified about claimant's accident and he immediately went to the scene. When he arrived, claimant was sitting on the ground and although he was conscious, he was not responsive and all he could do was moan. Mr. Gregory noticed blood on the ground around where claimant had been and noticed blood running down the back of claimant's head. He did not notice anything claimant could have tripped over. He found no blood on the trailer door. Mr. Gregory believed the wind blew the trailer door and struck claimant in the back of the head causing him to fall to the ground.

Claimant met with John Leenay, Psy. D., LP, for neuropsychological testing and an evaluation, on April 10, 2014, at the request of his attorney. Claimant reported he did not know how he was injured, but people have told him he was hit in the head by a swinging door on his truck.

Dr. Leenay found claimant to be pleasant and cooperative. He noted claimant was disorientated to place, time and sometimes situation. He had significant seeing and hearing problems and wore a number of different glasses to complete the visual portion of testing. Psychological testing for his emotional state could not be completed as claimant reported he couldn't see to read the questions.

Dr. Leenay opined:

. . . given the severity of his head injury, I think it was far more likely his injury was caused by being struck on the back of his head than by the winds hitting the rear door of his truck he was loading or unloading and thrown to the ground than by fainting alone. I have never seen this in 30 years practicing as a psychologist. . . .

³ *Id.* at 62.

Assuming he was stronger before his accident than now, I do not think people can be blown to the ground simply by wind gusts of more than 40 MPH resulting in such a severe head injury and I was provided no evidence of Mr. Wilson having any ataxia, use of alcohol, drugs, or medications, syncope, or other manifestations that could result in him fainting.⁴

In a letter dated October 1, 2014, Dr. Leenay responded to a series of questions presented to him by claimant's counsel and regarding additional medical records from Via Christi and Dr. Murati's report. He wrote the additional records did not modify his opinions, but further support his opinion that claimant was far more likely to have been hit on his head by the swinging door on the back of the truck due to high winds than by fainting or other medical conditions. He opined the work accident was the prevailing factor for claimant's need for medical treatment.

Claimant was originally examined by board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., on referral by his attorney. Dr. Murati's detailed evaluation of claimant was discussed in the Board's Order of September 16, 2013, and will not be repeated herein. The injuries and resulting impairments to claimant were significant and described in detail.

In a letter dated August 20, 2014, Dr. Murati responded to questions presented by claimant's attorney. In that letter, Dr. Murati opined it is more probably true than not that claimant was struck in the back of the head by a swinging trailer door.

A 4 cm L shaped laceration on the back of claimant's head was originally reported in the Wesley Medical Center report of April 15, 2012.⁵ However, the significance of this medical finding was not fully explained until addressed by Dr. Murati in the August 20, 2014, letter. Dr. Murati found it more probable than not that the trailer door struck claimant, knocking him to the pavement. The doctor explained the blow to the back of claimant's head by the trailer door would result in the laceration on the back of his head and also would explain the "bifrontal hemorrhage" which would have occurred after claimant's head hit the ground. Falling and hitting the ground face first would account for the dried blood in claimant's nose and would result in a more severe head injury than would occur with fainting. Dr. Murati opined that, given the information available, it is more probable than not that claimant was struck in the back of the head by the swinging trailer door, causing the laceration to the back of the head and forcefully pushing him to the ground, sustaining further head and other bodily injuries.⁶

⁴ *Id.*, Cl. Ex. 3 at 10 (Dr. Leenay's Aug. 18, 2014, report).

⁵ *Id.* (Apr. 30, 2013), Cl. Ex. 7.

⁶ *Id.* (Nov. 25, 2014), Cl. Ex. 5.

Claimant met with Chris Fevurly, M.D., on October 28, 2014, for an examination at respondent's request. Dr. Fevurly examined claimant and his prior medical records and found claimant suffered blunt head trauma on April 14, 2012, resulting in a occipital skull fracture, brain hemorrhage, hematoma and laceration to the back of the head, frontal lobe contusion, right visual field hemianopia, worsening of his moderately severe preexisting hearing deficit, and memory cognitive and emotional changes due to traumatic brain injury.

Dr. Fevurly opined it was clear claimant suffered injury on April 14, 2012, but it was not clear if that occurred when the wind blew the door into him, or when he fell to the ground and lost consciousness. With no witness and no recollection by claimant, Dr. Fevurly found the fall and head trauma were of unknown origin. He opined the information available does not make it clear within a reasonable degree of medical certainty to determine the mechanism of claimant's injury leading to his occipital head trauma and subsequent traumatic brain injury. He also felt there was no way to determine if the injury resulted from an idiopathic fall or if claimant was struck by the door or pushed down by the door from the wind, based on just the evaluation of claimant's injuries.

Claimant met with T. A. Moeller, Ph.D., for a psychological evaluation, on November 27, 2014, at respondent's request. Dr. Moeller noted claimant attributes a number of his health issues to the work-related injury, specifically his vision and hearing challenges, the need to take insulin, his memory and orientation issues and problems with his pacemaker. Dr. Moeller felt it was not possible, within a reasonable degree of psychological certainty, to determine the mechanism of claimant's injury.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the

injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

K.S.A. 2012 Supp. 44-508(f)(2)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2012 Supp. 44-508(f)(3)(A) states:

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

When originally determined by this Board Member in the September 16, 2013, Order, the injuries suffered to the back of claimant's head had not been fully explained. The analysis by Dr. Murati, describing the injuries to both the back of claimant's head and the front, appear to support an injury being caused by claimant being hit by the door, followed by additional injuries suffered from claimant landing face first on the ground. The severity of claimant's injuries do not appear medically probable from claimant simply fainting. Dr. Murati explained that more force than a simple fainting spell would be required for claimant's extensive injuries to result.

This Board Member finds the explanation provided by Dr. Murati to be persuasive in this matter. Claimant was more probably than not, struck by the door, swinging in the wind. He then fell forcibly to the ground where he was discovered by his co-workers. Claimant has satisfied his burden of proving he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The award of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has proven he suffered personal injury by accident which arose out of and in the course of his employment with respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Gary K. Jones dated January 9, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Gary K. Jones, Administrative Law Judge

⁷ K.S.A. 2013 Supp. 44-534a.